

Docket: 2006-378(IT)I

BETWEEN:

BARRY BREGER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on December 8, 2006, at Montreal, Quebec, by  
The Honourable Justice C.H. McArthur

Appearances:

For the Appellant:

The Appellant himself

Counsel for the Respondent:

Chantal Roberge

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**JUDGMENT**

The appeal from the assessment of tax made under the *Income Tax Act* for the 2004 taxation year is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to include the amounts paid for supplements prescribed by a doctor and recorded by a pharmacist in computing a medical expense credit pursuant to paragraph 118.2(2)(n) of the *Act*.

Signed at Ottawa, Canada, this 30th day of April 2007.

"C.H. McArthur"

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McArthur J.

Citation: 2007TCC254

Date: 20070430

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BETWEEN:

BARRY BREGER,

Appellant,

and

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Respondent.

### **REASONS FOR JUDGMENT**

McArthur J.

[1] This appeal is from an assessment of the Appellant's 2004 taxation year. The Minister of National Revenue denied the Appellant's claim for a medical expense credit under paragraph 118.2(2)(n) of the *Income Tax Act*, for the cost of medicinal, nutritional and herbal supplements in the amounts of \$227.30 and \$6,512.78, for the treatment of his wife's less common ailments. The issue is whether the cost of the supplements that were prescribed by a medical doctor and dispensed and recorded by a pharmacist may be included in computing a medical expense credit.

[2] The Appellant is a qualified medical doctor who practices orthomolecular medicine. This is not commonly practiced in Quebec and is the practice of the using of molecules "known to the body" in the treatment and/or prevention of disease and certain chronic conditions. Using orthomolecular medicine, the Appellant has been treating his wife, who has a heavy medical history of various and severe ailments, with a specific dietary and vitamin regime.

[3] In the course of her treatment, the Appellant has prescribed certain medicinal, nutritional and herbal supplements. These prescriptions were filled by a licensed

pharmacist, duly recorded, and official receipts were issued. However, it is admitted that the supplements are not listed as a prescription drug in any of the Schedules to the *Quebec Pharmacy Act*<sup>1</sup> or its accompanying regulations.

[4] Despite the fact that the supplements in question were both prescribed by a medical doctor and recorded by a pharmacist, it is the Minister's position that the Appellant's claim should be disallowed because the medications were not required to be recorded by a pharmacist and could have been purchased “over the counter” without the intervention of a pharmacist.

[5] In reassessing the Appellant’s 2004 taxation year, the Minister made the following assumptions of fact:

- (a) The Appellant is a doctor by profession and in filing the income tax return for the taxation year claimed medical expenses incurred for himself, spouse and child in the amount of \$10,038;
- (b) The Minister issued a letter to the Appellant, August 3, 2005, by which the Appellant was informed that the claim for the medical expenses for the 2004 taxation year was under review and he was requested to submit receipts, medical certificates, and/or supporting documentation applicable for the period;
- (c) The Minister received and reviewed the submitted documentation and informed the Appellant on October 14, 2005, that the claim for eligible medical expenses was reduced to \$3,369 as:
  - (i) “The fees you pay for medical services must be paid to a medical practitioner. Naturopath and massage therapist are not recognized as medical practitioners in the province where you received the services.” And
  - (ii) “Vitamins, herbs, including over-the-counter medicaments, and similar substances are not deductible as a medical expense.”
- (d) Following the Notice of Objection the Minister concluded that there was an additional amount, \$39.00 that was an eligible medical expense;
- (e) The expenses disallowed were:

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<sup>1</sup> *Revised Statutes of Quebec*, c.P.10.

- (i) For amounts claimed by the Appellant for non-prescription nutrients, vitamins and mineral supplements for himself;
- (ii) For amounts claimed by the Appellant for non-prescription nutrients, vitamins and mineral supplements as prescribed by the Appellant for his spouse, and dispensed by a pharmacist.

[6] Paragraph 118.2(2)(n) of the *Act* stipulates as follows:

- 118.2(2) For the purposes of subsection (1), a medical expense of an individual is an amount paid
- (n) for drugs, medicaments or other preparations or substances (other than those described in paragraph (k)) manufactured, sold or represented for use in the diagnosis, treatment or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof or in restoring, correcting or modifying an organic function, purchased for use by the patient as prescribed by a medical practitioner or dentist and as recorded by a pharmacist;  
(emphasis added)

This statutory provision sets out three criteria for a drug or other medicament to be considered an eligible medical expense under paragraph 118.2(2)(n). The medicament must be:

- (i) used in the diagnosis, treatment or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof or in restoring, correcting or modifying an organic function;
- (ii) prescribed by a medical practitioner; and,
- (iii) recorded by a pharmacist.

In this appeal only the third criterion, “recorded by a pharmacist”, is at issue.

[7] The meaning of “as recorded by a pharmacist” was considered by the Federal Court of Appeal in *Ray v. Canada*.<sup>2</sup> The Court reversed the common sense finding of

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<sup>2</sup> 2004 FCA 1.

the trial judge,<sup>3</sup> and, writing for a unanimous court, held that the statutory requirement of “as recorded by a pharmacist” must be met before expenses may qualify as “medical expenses” for the purpose of the tax credit under paragraph 118.2(2)(n). Sharlow J. stated:

[11] ... it is not open to this Court, or the Tax Court, to disregard statutory requirements imposed by Parliament, even if they are difficult to rationalize on policy grounds. It is for Parliament alone to determine whether the words "as recorded by a pharmacist" should be removed from paragraph 118.2(2)(n).

[12] In my view, it is reasonable to infer that the recording requirement in paragraph 118.2(2)(n) is intended to ensure that tax relief is not available for the cost of medications purchased off the shelf. There are laws throughout Canada that govern the practice of pharmacy. Although the laws are not identical for each province and territory, they have common features. Generally, they prohibit a pharmacist from dispensing certain medications without a medical prescription, and they describe the records that a pharmacist is required to keep for medications dispensed by prescription, including information that identifies the prescribing person and the patient. There is no evidence that pharmacists anywhere in Canada are required to keep such records for the substances in issue in this case.

[13] I cannot accept the suggestion that, in the case of a medication that is prescribed by a physician but is purchased at a pharmacy off the shelf, a sales slip or invoice from the pharmacist would be a sufficient "recording" to meet the statutory requirement. A record in that form cannot meet the apparent function of the recording requirement. There must be a record kept by the pharmacist in his or her capacity as pharmacist. That necessarily excludes substances, however useful or beneficial, that are purchased off the shelf. [emphasis added]

[8] It is the Respondent’s position that the computation of the medical expense credit, pursuant to subsection 118.2(1) and paragraph 118.2(2)(n) of the *Act*, is restricted to items that are classified as “prescription medications” and which pharmacists are required by law to maintain a record of their issuance.

[9] A distinction between a substance having been prescribed and being a prescription drug was suggested in *obiter dictum* found in *Dunn v. The Queen*<sup>4</sup> at paragraph 6:

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<sup>3</sup> O’Connor J., the trial judge, stated: "if the medications are prescribed by a doctor and they make the difference between life and death or functioning or not functioning, they should fall under paragraph 118.2(2)(n)".

<sup>4</sup> 2002 FCA 506.

Although we do not need to decide the point, it would appear that the requirement that medication be recorded by a pharmacist may be to limit the entitlement to payments for medications that are only available upon prescription as opposed to over the counter or other medications. In this case the Tax Court judge found that the medications provided were not available through regular pharmacies or other medical supply sources and upon our review of the record, it is certainly not obvious that the medications prescribed were prescription drugs.

Counsel for the Respondent relied on the decisions of the Federal Court of Appeal in *Ray* and *Dunn* to distinguish between prescription drugs and drugs having been prescribed.

[10] Counsel also referred to the decision of this Court in *Herzig v. The Queen*<sup>5</sup> as an example of sympathetic cases denied by the finding in *Ray* on the basis that the items at issue were not recorded by a pharmacist. In *Herzig*, Bowman J. regrettably dismissed the appeal in “a most deserving case” stating that this Court was bound by the narrow interpretation of paragraph 118.2(2)(n) according to *Ray*.

[11] Counsel for the Respondent added that “the law looks at the medications” and emphasized that “there is no evidence that pharmacists anywhere in Canada are required to keep records for the dispensing of nutrients, vitamins and mineral supplements”. In support of this position, counsel referred to the decision of this Court in *Melnychuk v. The Queen*,<sup>6</sup> wherein the taxpayer sought to claim the cost of vitamin supplements which were prescribed by a physician but equally available over the counter without a prescription. Evidence was introduced at the hearing that it was store policy to issue pharmacy receipts and labels and to make entries on a customer profile for all medicaments prescribed by a physician. Further to the particular pharmacy’s policies or manufacturer’s requirements, certain medicaments were kept behind the pharmacist’s counter and required the intervention of a pharmacist even though they were available without a prescription.

[12] The trial judge in *Melnychuk* disallowed a deduction for some medications for the following reasons:

[14] In light of all of the evidence before the Court, I am not satisfied that it has been shown that the Appellant’s purchases of the vitamin supplements were recorded by a pharmacist, as required by paragraph 118.2(2)(n) of the *Act*. The interpretation

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<sup>5</sup> 2004 TCC 344.

<sup>6</sup> 2004 TCC 812.

to be given to the words "recorded by a pharmacist" was decided by the Federal Court of Appeal in the case of *Ray* ...

[15] As in the *Ray* case, there is no evidence before me that the pharmacist who filled the Appellant's prescriptions was required by law to keep records relating to the filling of those prescriptions ...

He went on to review the *Alberta Pharmacy Professions Act*, and specifically, regulation 15(6):

[15] ... The *Pharmaceutical Profession Act* defines "drug" in paragraph 1(*h*) as a substance or combination of substances listed in the Schedules to that *Act*. The evidence in this case does not show that the vitamin supplements in question are listed in those schedules such that a pharmacist would be required by law to keep a record of their dispensation. Mr. Fong described the supplements as non-prescription items, which further supports the conclusion that they were not "drugs" within the meaning of the *Pharmaceutical Profession Act*.

...

[17] ... The requirement that a medication be recorded by a pharmacist refers to the recording requirements found in legislation governing pharmacists in each province and territory. Unless that legislation requires a pharmacist to keep a record of the sale of a particular medication, the cost of the medication will not be a medical expense under the *Income Tax Act*, regardless of how it is sold or treated within a particular pharmacy.

[18] The notion of what meets the requirement in the *Income Tax Act* of being "recorded by a pharmacist" cannot be determined by a particular store's policy in handling the sale of over-the-counter medications. To hold otherwise would result in a difference in tax treatment based on where a taxpayer chose to shop for over-the-counter medication rather than on the identity of the medication purchased. I do not believe that this could have been the intention of Parliament when enacting paragraph 118.2(2)(*n*) of the *Income Tax Act*.

Respectfully, I disagree. The Court must apply the clear language of the *Act* and interpret the statute as it finds it.<sup>7</sup>

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<sup>7</sup> Rothstein J. in *Chaya v. The Queen*, 2004 FCJ 227, October 4, 2004.

[13] The Appellant contends that the three requirements of paragraph 118.2(2)(n) have been met in this matter. Unlike the facts in *Melnychuk*, the Appellant's medications were recorded by a pharmacist. The Appellant further submits that his case should be distinguished from the facts in *Ray* and *Selent* because in those cases, no record was kept by the pharmacist nor was one required to be kept by law. By contrast, the Appellant relies on the provisions of the *Quebec Pharmacy Act* and accompanying regulations as the legislation governing pharmacists in his province to argue that a pharmacist in Quebec is required to record the issue of any medications prescribed by a medical doctor. I agree with the Appellant.

[14] Section 21 of the *Quebec Pharmacy Act* states:

21 A pharmacist must fill a prescription according to its integral terms.

And section 2.01 of the *Regulation Respecting the Keeping of Records, Books and Registers by a Pharmacist in the Practice of his Profession*,<sup>8</sup> states:

2.01 Subject to sections 2.04 and 2.05, a pharmacist shall keep at the place where he practices his profession a record for each patient in respect of whom a prescription is filled. [emphasis added]

The following definitions provided in section 1 of the *Quebec Pharmacy Act* are also relevant to this analysis:

- (c) "pharmacist" or "member of the Order": any person entered on the roll;
- (d) "physician": any member of the Ordre des médecins du Québec;
- ...
- (h) "medication": any substance or mixture of substances which may be used:
  - (i) for the diagnosis, treatment, remission or prevention of any disease, ailment, any abnormal physical or mental condition, or their symptoms in man or animal; or
  - (ii) to restore, rectify or change organic functions in man or animal;
  - ...
- (j) "prescription": an authorization to supply a medication,
  - (i) given by a person authorized to prescribe medication by a law of Québec;

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<sup>8</sup> R.R.Q. 1981, c. P-10, r.19.

- (ii) given by a person authorized to prescribe medication by a law of another province or of a territory in Canada to the extent that such person would be authorized to prescribe such medication by a law of Québec if he were practicing in Québec;

[15] Paragraph 118.2(2)(n) states plainly that a medication that is prescribed by a medical practitioner as defined in the *Act* and recorded by a pharmacist is an eligible medical expense. In the case before me, the prescriptions for the supplements were written by a qualified medical doctor and were recorded by an authorized pharmacist. These facts are not in dispute.

[16] Moreover, it is clear from the reasons in *Ray* and *Melynychuk*, that substances which could be purchased off the shelf were excluded because the Court was not presented with any evidence that a pharmacist was required by law to keep a record of its issuance in his or her capacity as a pharmacist and was only presented with a store receipt or invoice. In the present case, I am satisfied that in Quebec, section 2 of the *Quebec Pharmacy Act*, when read in conjunction with the regulations concerning the recordkeeping practices required of pharmacists, clearly indicates that the prescriptions were filled and recorded by the pharmacist in his professional capacity as a pharmacist.

[17] In my view, it would be a departure from the finding in *Ray* and the plain meaning of paragraph 118.2(2)(n) of the *Act* to interpret the provision so narrowly as to limit its application to prescription drugs as listed in specified schedules alone. This would add another requirement, which in most cases would be coincident, but is not contemplated by the *Act*.

[18] From my reading of the provision, eligibility under paragraph 118.2(2)(n) of the *Act* is determined not by the classification of the medication but by the execution of certain actions by the authorized professionals who control the access to that medication. A licensed medical practitioner and pharmacist must fulfill their professional duties when prescribing and dispensing medication, respectively, as authorized by law; these are the statutory hurdles set out by Parliament, and the Appellant has met them.

[19] In light of my conclusion, it is unnecessary to consider the effect of the ruling the Appellant had previously received from the Canada Revenue Agency.

[20] For the foregoing reasons, I allow the appeal and refer the matter back to the Minister for reconsideration and reassessment on the basis the Appellant is entitled to include the amounts paid for the supplements that were prescribed by a doctor, and recorded by a pharmacist in computing a medical expense credit in accordance with paragraph 118.2(2)(n) of the *Act*.

Signed at Ottawa, Canada, this 30th day of April, 2007.

"C.H. McArthur"

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McArthur J.

CITATION: 2007TCC254

COURT FILE NO.: 2006-378(IT)I

STYLE OF CAUSE: BARRY BREGER and  
HER MAJESTY THE QUEEN

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: December 8, 2006

REASONS FOR JUDGMENT BY: The Honourable Justice C.H. McArthur

DATE OF JUDGMENT: April 30, 2007

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Chantal Roberge

COUNSEL OF RECORD:

For the Appellant:	
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Firm:	N/A
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada